95-1174

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HYUNDAI MERCHANT MARINE CO., LTD., POHANG IRON AND STEEL CO., LTD., THE ORIENTAL FIRE & MARINE INSURANCE CO., LTD., THE SHIN DONG-A FIRE & MARINE INSURANCE CO., LTD., DAEHAN FIRE, MARINE INSURANCE CO., LTD., INTERNATIONAL FIRE & MARINE INSURANCE CO., LTD., KORYO FIRE & MARINE INSURANCE CO., LTD., FIRST FIRE & MARINE INSURANCE CO., LTD., HAEDONG FIRE & MARINE INSURANCE CO., LTD., THE ANKUK FIRE & MARINE INSURANCE CO., LTD., HYUNDAI MARINE & FIRE INSURANCE CO., LTD., LUCKY INSURANCE CO., LTD., KOREA AUTOMOBILE FIRE & MARINE INSURANCE CO., LTD.,

Petitioners,

—against—

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a statute drafted by the executive branch and included within a lengthy appropriations bill, which retroactively abolished longstanding federal subject matter jurisdiction over exactly one suit pending against the United States, thereby deciding the suit in the Government's favor, and which was enacted without prior notice to the District Court or to the plaintiffs in that action, unconstitutionally violated the separation of powers and denied plaintiffs due process of law?

RULE 29.6 STATEMENT

Petitioners herein are limited liability companies that have no parents, subsidiaries or affiliated companies that have issued shares to the public.

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No. __-____

HYUNDAI MERCHANT MARINE CO., LTD., POHANG IRON AND STEEL CO., LTD., THE ORIENTAL FIRE & MARINE INSURANCE CO., LTD., THE SHIN DONG-A FIRE & MARINE INSURANCE CO., LTD., DAEHAN FIRE, MARINE INSURANCE CO., LTD., INTERNATIONAL FIRE & MARINE INSURANCE CO., LTD., KORYO FIRE & MARINE INSURANCE CO., LTD., FIRST FIRE & MARINE INSURANCE CO., LTD., HAEDONG FIRE & MARINE INSURANCE CO., LTD., THE ANKUK FIRE & MARINE INSURANCE CO., LTD., HYUNDAI MARINE & FIRE INSURANCE CO., LTD., LUCKY INSURANCE CO., LTD., KOREA AUTOMOBILE FIRE & MARINE INSURANCE CO., LTD.,

Petitioners,

—against—

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for

the Second Circuit in this case, which involves an important question of federal law that has not been, but should be, settled by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals of which review is sought (1a)[1] was decided and entered on January 26, 1996. It is reported at 75 F.3d 134 (2d Cir. 1996). The opinion of the District Court (4a) is reported at 888 F. Supp. 543 (S.D.N.Y. 1995).

JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1996. A petition for a writ of certiorari is due on April 25, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATIES AND STATUTES INVOLVED

This case involves 10 U.S.C. § 2798 (1996), which provides in pertinent part:

> (a) CLAIMS BARRED. No civil action may be brought against the United States on the basis of the content of a navigational aid prepared or disseminated by the Defense Mapping Agency.
>
> (b) NAVIGATIONAL AIDS COVERED. Subsection (a) applies with respect to a navigational aid in the form of a map, a chart, or a publication and any other form or medium of product or information in which the Defense Mapping Agency prepares or disseminates navigational aids.

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[1] References to the Appendix hereto are cited as "__a". References to the Joint Appendix in the Court of Appeals are cited as "JA___".

Section 1074(d) of Pub.L. 103-337 provided:

> (d) EFFECTIVE DATE. Section 2798 of title 10, United States Code, as added by subsection (b), shall take effect on the date of the enactment of this Act and shall apply with respect to (1) civil actions brought before such date that are pending adjudication on such date, and (2) civil actions brought on or after such date.

STATEMENT OF THE CASE

This is an action against the United States under the Suits in Admiralty Act ("SIAA"), 46 U.S.C. App. §§ 741-752 (1995), seeking damages of more than $40 Million for the grounding and total loss of the ship Hyundai New World and her cargo.[2] Petitioners allege that the grounding resulted from the negligent failure of the Defense Mapping Agency ("DMA")[3] to notify mariners of material information received subsequent to the DMA's publication in 1983 of a chart of

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[2] Section 742 of the SIAA, enacted in 1920, provides in pertinent part:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States . . . .

46 U.S.C. § 742 (1975).

[3] The DMA is the United States government agency responsible for publishing charts of foreign waters and correcting those charts through weekly Notices to Mariners. The DMA performs these functions pursuant to 10 U.S.C. § 2791, which states:

> The Defense Mapping Agency is an agency of the Department of Defense. The Defense Mapping Agency *shall* improve means of navigating vessels of the Navy *and the merchant marine* by providing, under the authority of the Secretary of Defense, accurate and inexpensive nautical charts, sailing directions, books on navigation, and manuals of instructions for the use of all vessels of the United States *and of navigators generally*. (Emphasis added.)

Brazilian waters. The grounding occurred in 1987, while the ship was navigating with the assistance of the DMA chart and all published DMA notices to mariners. Prior to the grounding, the DMA had received reports of a 1984 survey and other information which stated that water depths shown on the DMA's 1983 chart in the vicinity where the vessel grounded were not accurate. The DMA, however, failed to issue a notice to mariners or otherwise to warn mariners about the danger of using its 1983 chart to navigate in that area. (6a-7a).

Petitioners commenced suit against the United States in 1989. The Government resisted Petitioners' efforts to obtain discovery and was twice sanctioned by the District Court for abuse of the discovery process. (JA107-108). On July 23, 1993, the Government moved to dismiss for lack of subject matter jurisdiction, claiming the SIAA to be inapplicable to Petitioners' claims. (JA109). The District Court denied the Government's motion on September 26, 1994. (JA249).

On April 22, 1994, while the Government's motion to dismiss was pending before the District Court, the Department of Defense ("DOD") transmitted its 1995 appropriations bill to the Senate Armed Services Committee. (JA368). Included within the bill was a provision barring suits based on DMA publications:

> No claim or action may be brought against the United States based upon the preparation or dissemination by the Defense Mapping Agency of any navigational aid, including but not limited to, maps, charts, publications, products or information, regardless of the form or medium of such aids. (JA374-375)

A section of the DOD's cover letter to the Senate Committee accompanying the appropriations bill explained the Department's request for the above-quoted provision[4]:

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[4] The District Court incorrectly attributed this letter to Senator Nunn. (8a).

> DMA relies heavily upon nautical and aeronautical products and information of other countries. A tremendous quantity of information is processed in preparing and distributing thousands of maps and charts and related information. DMA exercises great care to ensure the accuracy of all its products. Since DMA cannot independently verify all the information supplied by foreign sources it is unreasonable to subject the United States to unlimited liability in the production and distribution of these many products.
>
> For example, in the case of *Hyundai Merchant Marine Co., Ltd. et. al. v. United States*, the HYUNDAI NEW WORLD, a 200,000 deadweight ton bulk cargo carrier, stranded in the Bay of Sao Marcos, Brazil, on 31 March 1987, resulting in a total loss of ship and cargo. The ship owner, cargo owners and underwriters of same sued the United States for negligence alleging that the navigators of HYUNDAI NEW WORLD were using DMA chart 2471 (A DMA facsimile of a Brazilian chart) containing errors and omissions which were the cause of the stranding. The potential damages to date are estimated at $60 million.
>
> This proposed statutory language would make it clear that the activities of the Defense Mapping Agency in the preparation and production of maps, charts, aids to navigation, publications, products and information, in whatever form, primarily for the use of U.S. warfighters, are expressly exempt from any claim or cause of action. (JA371).

The instant action was the only case cited by the DOD in its request to Congress for legislation barring claims based on DMA navigational aids.

As reported out of the Senate Armed Services Committee, the defense appropriations bill contained the language that was to be enacted into law:

> (a) CLAIMS BARRED.—No civil action may be brought against the United States on the basis of the content of a navigational aid prepared or disseminated by the Defense Mapping Agency. (JA378).

The bill included a provision for its retroactive application to civil actions brought before the date of enactment. (JA379). The bill was passed by both Houses without change and was signed into law on October 5, 1994. It has been codified as 10 U.S.C. § 2798.

While the appropriations bill was working its way through Congress, the District Judge was preparing an opinion denying the Government's motion to dismiss under existing law.[5] (JA249). The Government did not advise the Court or the Petitioners that the DOD had submitted to Congress proposed legislation, which, if applied retroactively, would withdraw subject matter jurisdiction from the Court. Furthermore, there apparently were no press reports about the proposed legislation, as a search in Nexis by Petitioners' counsel revealed none.

On November 7, 1994, the Government moved to dismiss on grounds that Section 2798 deprived the court of subject matter jurisdiction over Petitioners' claims. (JA262). After quashing Petitioners' discovery regarding the enactment of the statute, 159 F.R.D. 424 (1995), the Court granted the Government's motion to dismiss. (4a). The Court of Appeals affirmed on January 26, 1996. (1a)

REASONS FOR GRANTING THE WRIT

This case presents an important question of federal law that should be decided by this Court—whether Congress, at the request of the executive branch, may pass retroactive legislation to obtain dismissal of a specific case pending against

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[5] The District Court's Opinion Order denying the Government's motion to dismiss was issued on September 26, 1994. (JA249).

the Government, thereby deciding that case in the Government's favor. At the heart of this Petition are fundamental considerations of the judiciary's independence in this country's tripartite system of government and the role of due process as a safeguard against unfair, "stealth legislation" intended to terminate otherwise valid pending suits against the Government without notice to the plaintiffs.

Petitioners' cause of action arose under the Suits in Admiralty Act, 46 U.S.C. App. §§ 741-752.[6] After participating in the litigation for more than five years, the Government resorted to a clandestine effort to legislate an end to the suit. Buried in the 1995 defense appropriations bill was a provision revoking the Government's waiver of sovereign immunity with respect to claims against the DMA. The provision was kept secret from Petitioners and the District Court, and it was routinely enacted, together with a provision for retroactivity, as part of the annual defense appropriation without debate, opposition, or publicity, to Petitioners' knowledge.

In the DOD's letter to Congress transmitting the defense appropriations bill, the DOD cited this case as its one and only example of litigation that would be precluded by Section 2798. Since there were no other cases pending involving claims against the DMA, the legislation must have been conceived for the purpose of resolving this action in favor of the Government.

Petitioners do not challenge the prospective application of the statute. Congress undoubtedly has the power to withdraw the Government's waiver of immunity as to cases that have not yet been filed. Congress may not, however, enact a retroactive law to obtain the dismissal of a specific case pending in federal court pursuant to a statutory waiver of sovereign immunity. To hold otherwise, as the Court of

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[6] The SIAA was enacted to waive the Government's sovereign immunity in maritime cases under circumstances where a private party would be liable.

Appeals did here, would allow the Government to decide litigation in its own favor, without affording the plaintiff notice or an opportunity to participate in that decision. This Court should grant certiorari to determine whether such an infringement on the power of the judiciary is an unconstitutional violation of the separation of powers and denies Petitioners due process of law.

I. The Petition Should be Granted to Establish that When Sued, the United States Must Allow the Judicial Branch to Determine the Outcome of the Litigation.

The separation of powers among the judicial, executive and legislative branches of government is a fundamental tenet of our legal system. This Court "has repeatedly 'given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.' " *Johnston v. Cigna Corp.*, 14 F.3d 486, 494 (10th Cir. 1994), *cert. denied*, 115 S.Ct. 1792 (1995), *quoting from Mistretta v. United States*, 488 U.S 361, 380 (1989). Under our system, the legislature enacts laws of general application and the courts decide particular cases. "Where acts of the Legislative Branch prevent the Judicial Branch from accomplishing its constitutionally assigned functions, Congress 'pass[es] over the limit which separates the legislative from the judicial power.' " *Rabin v. Fivzar Associates*, 801 F. Supp. 1045, 1052 (S.D.N.Y. 1992), *quoting from United States v. Sioux Nation of Indians*, 448 U.S. 371, 391 (1980).

In *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), this Court held that Congress had unconstitutionally violated the separation of powers when it passed a law which required a decision favorable to the Government in a pending case against the Government. The case concerned a claimant who had sued the United States in the Court of Claims to recover

proceeds from the sale of property confiscated during the Civil War. The law at the time allowed such a claim for property owners who could prove that they had never aided the Confederacy and were loyal to the United States. A claimant could meet his burden of proof by showing that he had received a Presidential pardon. While the claim was pending, however, Congress passed a law which provided that a Presidential pardon was inadmissible as evidence demonstrating loyalty and that in any such case the Supreme Court must dismiss an appeal from the Court of Claims for want of jurisdiction.

This Court held the statute to be unconstitutional, reasoning:

> What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this Court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of the pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the Legislature may prescribe rules of decision to the Judicial Department of the Government in cases pending before it?
>
> We think not . . . .
>
> * * *
>
> We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

80 U.S. (13 Wall.) at 146-147.

In *United States v. Sioux Nation of Indians*, this Court stated that the statute ruled upon in *Klein* was unconstitutional because "it prescribed a rule of decision in a case pending

before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor." 448 U.S. at 404. The separation of powers principle established by *Klein* remains an important principle of constitutional law. *See, e.g., Robertson v. Seattle Audubon Society*, 503 U.S. 429, 118 L.Ed.2d 73, 86 (1992).

In passively rubber stamping the DOD's statute, Congress established a rule of decision in this case requiring a judgment in the Government's favor. Section 2798 was targeted solely at eliminating Petitioners' cause of action. There was no other pending litigation against the United States based on a claim that the DMA was negligent in maintaining its nautical charts and publications, and Petitioners' suit was the only case mentioned in the DOD's transmittal letter. It is difficult to conceive of a clearer instance of Congress affecting the rule of decision in pending litigation to require a decision in the Government's favor.

The Petition should be granted so that this Court may delineate the constitutional obligation of the executive and legislative branches to allow the judicial branch to determine the outcome of suits against the Government pending in the federal courts. Under the decision below, the executive branch may insert legislation retroactively withdrawing jurisdiction from the courts over a specific case in a voluminous but innocuous bill without notifying the plaintiff or the district court in which the case is pending. When the bill is passed routinely, without careful analysis or debate, and signed into law, the case must be dismissed.

Unless this Court grants the instant Petition, anyone who sues the Government will be obliged not only to employ an attorney, but, in addition, a professional lobbyist, to review all bills submitted by the executive branch to Congress for a provision withdrawing jurisdiction over the suit from the courts. Moreover, in today's complex legislative environment, Congress cannot be expected to identify and delete such

improper provisions from proposed legislation. As this case demonstrates, it is relatively easy for a Government agency to conceal a retroactive provision to terminate a bothersome lawsuit within a lengthy but otherwise uncontroversial appropriations bill and have it enacted without notice or debate, thereby insuring that a litigant would be unaware of the proposed statute until after it had become law. This Court should grant the Petition to determine the constitutionality of such actions and to delineate the limits of the executive and legislative branches' power to decide cases pending before the judicial branch by withdrawing a federal court's subject matter jurisdiction over such cases.

II. The Court of Appeals' Decision that Petitioners' Perfected Cause of Action Against the Government May Be Extinguished by Congress Is Contrary to Prior Decisions of This Court.

This Court has long held that a legislature may not extinguish a vested property right without due process of law. *Pritchard v. Norton*, 106 U.S. (16 Otto) 124 (1882). A perfected cause of action has been held to be a protected vested right. *Ettor v. Tacoma*, 228 U.S. 148 (1913). In *Ettor*, plaintiffs filed suit against the City of Tacoma for consequential damages to real property as a result of street grading. A state statute existing at the time of injury waived sovereign immunity for damages resulting from such grading, and plaintiffs accordingly sued the City in state court pursuant to the statute. While the case was being heard, the state legislature amended the statute to remove the waiver of immunity, and the state court consequently dismissed the action. This Court reversed, expressly holding plaintiffs' right to compensation under the original statute to be "a vested property right" which could not constitutionally be legislated away without due process of law, even though the case had not reached final judgment when the right of action was repealed. 228 U.S. at 158.

Ettor is indistinguishable in any meaningful respect from the present action. In both cases, a government caused injury to plaintiffs, who had a right to sue the government for damages under a previously existing statute that waived sovereign immunity. In both cases, the suit had reached an advanced stage of litigation, but not final judgment, when legislation repealing the right of action was enacted. *Ettor*, therefore, compels the conclusion that Section 2798 is unconstitutional as applied in this case.

The same principle applied in *Ettor* has been the basis for other rulings by this Court invalidating the retroactive application of statutes that sought to extinguish pending actions for damages. *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922); *Pacific Mail Steamship Co. v. Joliffe*, 69 U.S. (2 Wall.) 450 (1864); *see also Coombes v. Getz*, 285 U.S. 434 (1932).

This Court's decision in *Ettor* is in accord with principles of international law upheld by the European Court of Human Rights in *Pressos Compania Naviera S.A. v. Belgium*, Case 38/1994/485/567 (Nov. 20, 1995). That case involved a Belgian law which retroactively extinguished the plaintiffs' right of action:

> ". . . the 1988 Act quite simply extinguished, with retrospective effect going back thirty years and without compensation, claims for very high damages that the victims of pilot accidents could have pursued against the Belgian State or against the private companies concerned, and in some cases even in proceedings that were already pending."[7]

Pressos Compania Naviera S.A. v. Belgium at ¶ 39.

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[7] The official version of *Pressos Compania Naviera S.A. v. Belgium* has not yet been published, but is expected to become available about one month from now. The quotations from the Judgment are taken from an unofficial report published in *European Transport Law* [1996] at 71-90.

The court found that the Belgian statute breached Article 1 of the First Protocol to the European Convention on Human Rights, which is essentially an international equivalent to the Due Process Clause. The court concluded: "Such a fundamental interference with the applicants' rights is inconsistent with preserving a fair balance between the interests at stake." *Pressos* at ¶ 43.

In this case, Petitioners brought suit pursuant to the SIAA, a longstanding statute that waives the Government's immunity with respect to such actions. Petitioners diligently prosecuted their claims for more than five years in reliance on the statutory waiver, and prevailed against the Government's prior motion to dismiss. Facing a trial on the merits under existing law, the Government secretly arranged for enactment of a retroactive statute to extinguish Petitioners' cause of action. This Court should grant certiorari to determine whether Petitioners had a vested property right in their cause of action against the Government which may not be legislated out of existence.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: April 25, 1996

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 959—August Term 1995

Argued: January 18, 1996 Decided: January 26, 1996

Docket No. 95-6178

HYUNDAI MERCHANT MARINE CO., LTD., POHANG IRON AND STEEL CO., LTD., THE ORIENTAL FIRE & MARINE INSURANCE CO., LTD., THE SHIN DONG-A FIRE & MARINE INSURANCE CO., LTD., DAEHAN FIRE, MARINE INSURANCE CO., LTD., INTERNATIONAL FIRE & MARINE INSURANCE CO., LTD., KORYO FIRE & MARINE INSURANCE CO., LTD., FIRST FIRE & MARINE INSURANCE CO., LTD., HAEDONG FIRE & MARINE INSURANCE CO., LTD., THE ANKUK FIRE & MARINE INSURANCE CO., LTD., HYUNDAI MARINE & FIRE INSURANCE CO., LTD., LUCKY INSURANCE CO., LTD., KOREA AUTOMOBILE FIRE & MARINE INSURANCE CO., LTD.,

Plaintiffs-Appellants,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

NEWMAN, *Chief Judge*,
MAHONEY and FRIEDMAN,* *Circuit Judges.*

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* Honorable Daniel M. Friedman, of the United States Court of Appeals for the Federal Circuit, sitting by designation.

Appeal from the June 6, 1995, judgment of the United States District Court for the Southern District of New York (Peter K. Leisure, Judge) dismissing plaintiffs' claim against defendant as barred by 10 U.S.C. § 2798 (1994).

Affirmed.

JOHN W. WALL, New York, N.Y. (Richard V. Singleton, Healy & Baillie, New York, N.Y., on the brief), *for plaintiffs-appellants*.

JANIS C. SCHULMEISTERS, U.S. Dept. of Justice, New York, N.Y. (Frank W. Hunger, Asst. Atty. Gen., Jack S. Rockafellow, U.S. Dept. of Justice, New York, N.Y., Mary Jo White, U.S. Atty., S.D.N.Y., New York, N.Y., on the brief), *for defendant-appellee*.

JON O. NEWMAN, *Chief Judge*:

This is an appeal from the June 6, 1995, judgment of the District Court for the Southern District of New York (Peter K. Leisure, Judge), dismissing a tort claim against the United States as barred by 10 U.S.C. § 2798 (1994). *Hyundai Merchant Marine Co. v. United States*, 888 F. Supp. 543 (S.D.N.Y. 1995). The appeal presents essentially two issues: (a) whether a suit based on the failure of the Defense Mapping Agency to update a navigational chart is within the scope of section 2798, which provides that "[n]o civil action may be brought against the United States on the basis of the content of a navigational aid prepared or disseminated by the Defense Mapping Agency," and (b) if so, whether the application of section 2798 in this case denies the appellants any constitutional rights.

The District Court answered the first question in the affirmative and the second question in the negative, and therefore dismissed the suit. We affirm on the basis of Judge Leisure's comprehensive and well-reasoned opinion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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89 Civ. 2025 (PKL)

HYUNDAI MERCHANT MARINE CO., LTD., POHANG IRON AND STEEL CO., LTD., THE ORIENTAL FIRE & MARINE INSURANCE CO., LTD., THE SHIN DONG-A FIRE & MARINE INSURANCE CO., LTD., DAEHAN FIRE, MARINE INSURANCE CO., LTD., INTERNATIONAL FIRE & MARINE INSURANCE CO., LTD., KORYO FIRE & MARINE INSURANCE CO., LTD., FIRST FIRE & MARINE INSURANCE CO., LTD., HAEDONG FIRE & MARINE INSURANCE CO., LTD., THE ANKUK FIRE & MARINE INSURANCE CO., LTD., HYUNDAI MARINE & FIRE INSURANCE CO., LTD., LUCKY INSURANCE CO., LTD., KOREA AUTOMOBILE FIRE & MARINE INSURANCE CO., LTD.,

Plaintiffs,

—against—

UNITED STATES OF AMERICA,

Defendant.

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Counsel for United States

OPINION AND ORDER

LEISURE, *District Judge*:

This is an action under the Suits in Admiralty Act, 46 U.S.C. app. §§ 741-52, by the owners of the Hyundai New World and parties related in interest (collectively, "plaintiffs") against the United States of America (the "Government"). Plaintiffs allege that the Hyundai New World ran aground off the coast of Brazil in 1987 as a result of the negligent publication and failure to update an inaccurate nautical chart by the Defense Mapping Agency (the "DMA"), an agency within the Department of Defense. The Government has moved to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

BACKGROUND

On October 5, 1994, 10 U.S.C. § 2798 ("Section 2798") was signed into law. Soon after Section 2798 was enacted, on November 7, 1994, the Government filed a motion to dismiss the instant action for lack of subject matter jurisdiction. It is well established that, in considering a motion to dismiss for want of subject matter jurisdiction, the Court must accept as true all material factual allegations in the complaint. *See, e.g., Atlantic Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd.*, 968 F.2d 196, 198 (2d Cir. 1992).

Applying the above standard, the facts of this case are as follows. On March 31, 1987, the Hyundai New World grounded on a shoal as it sought to enter the Baia de Sao Marcos in Brazil resulting in the total loss of the vessel. In entering the Baia de Sao Marcos, the master of the Hyundai New World used DMA Chart 24271 (13th Ed.) ("Chart 24271") which did not accurately indicate the position of this shoal. Chart 24271 was published on April 23, 1983. The Chart states that it is a reproduction of Brazilian Chart 411 (2d Ed.), a chart produced by the Brazilian government based on surveys by the Brazilian Navy to 1974.[1] In addition to producing Chart 24271 and other charts, the Defense Mapping Agency Hydrographic/Topographic Center ("DMAHTC") publishes weekly Notices to Mariners which serve to update existing charts with new hydrographic information.

In 1984, the Brazilian government performed new hydrographic surveys in the Baia de Sao Marcos. These hydrographic surveys indicated that the shoal on which the Hyundai New World later foundered had extended northward and eastward. As a result, water depths were now 14 to 17 meters in areas where they were indicated as 25 to 38 meters on Chart 24271. Prior to the grounding of the Hyundai New World, the DMAHTC received charts from the Brazilian government and notices from the British government which indicated these

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[1] The parties dispute what sources were in fact used in preparing Chart 24271.

reduced water depths. The DMAHTC did not publish a Notice to Mariners conveying this information prior to the grounding of the Hyundai New World.

DISCUSSION

A. *Applicability of § 2798*

Section 2798 provides, in pertinent part:

> (a) Claims Barred—No civil action may be brought against the United States on the basis of the *content* of a navigational aid prepared or disseminated by the Defense Mapping Agency. (b) Navigational Aids Covered—Subsection (a) applies with respect to a navigational aid in the form of a map, a chart, or a publication and any other form or medium of product or information in which the Defense Mapping Agency prepares or disseminates navigational aids.
>
> (d) Effective Date—Section 2798 of title 10, United States Code, as added by subsection (b), shall take effect on the date of the enactment of this Act and shall apply with respect to (1) civil actions brought before such date that are pending adjudication on such date, and civil actions brought on or after such date.

10 U.S.C. § 2798 (emphasis added). This provision became effective on October 5, 1994.

The Government contends that as a result of the recent enactment of Section 2798, this Court no longer has jurisdiction over the tort claims against the United States alleged in plaintiffs' complaint. *See* Memorandum of Defendant United States in Support of its Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim by Reason of Newly Passed Statute ("Defendant Mem.") at 3. The Government claims that, in enacting § 2798, Congress clarified that the United States has not, and had not, waived sovereign immunity with respect to lawsuits based upon the

content of Defense Mapping Agency maps, charts and other publications, and that Congress specifically provided for the statute's retroactive effect.

The Government quotes Senator Nunn as saying:

> Certain DMA mapping, charting and geodesy (MC&G) nautical and aeronautical products are needed and used by the general public. DMA accommodates this need through an extensive public sale program. It is crucial that end users rely on the most current and accurate products available to assure safety of navigation. . . .
>
> Section 923 amends Chapter 147 of title 10, United States Code, by adding a new section to grant the Defense Mapping Agency an express exemption from liability associated with the preparation or dissemination of its products, in whatever form. This language would make clear that the activities of the Defense Mapping Agency in the preparation and production of maps, charts, aids to navigation, publications, products and information are expressly exempt from any claim or action. . . .
>
> Since DMA cannot independently verify all the information supplied by foreign sources it is unreasonable to subject the United States to unlimited liability in the production and distribution of these many products.
>
> For example, in the case of Hyundai Merchant Marine Co., Ltd., et al. v. United States, the HYUNDAI NEW WORLD, a 200,000 deadweight ton bulk cargo carrier, stranded in the Bay of Sao Marcos, Brazil, on 31 March 1987, resulting in a total loss of ship and cargo. The ship owner, cargo owners and underwriters of same, sued the United States for negligence alleging that the navigators of HYUNDAI NEW WORLD were using DMA chart 271 [sic] (A DMA facsimile of a Brazilian chart) containing errors and omissions which were the cause of the

> stranding. The potential damages to date are estimated at $60 million.
>
> The proposed statutory language would make it clear that the activities of the Defense Mapping Agency in the preparation and production of maps, charts, aids to navigation, publications, products and information, in whatever form, primarily for use of U.S. warfighters, are expressly exempt from any claim or cause of action.

140 Cong. Rec. S5049-03, S5065.

It has also been reported:

> The second provision would make it clear that the United States has not waived sovereign immunity with respect to lawsuits based upon the content of DMA maps and charts. Claims against DMA are prohibited under the Federal Torts Claims Act, but an issue has arisen as to whether the Suits in Admiralty Act (46 U.S.C. 741 et seq.) provides an independent jurisdictional basis for lawsuits against DMA. The provision recommended by the committee would make it clear that the government has not waived sovereign immunity with respect to claims based upon allegations concerning the content of DMA maps and charts.

103 S. Rept. 282, 103d Cong., 2d Sess. ("Senate Report") at p. 231-32 (1994).

Finally, the House report states:

> The Senate bill contained provision (sec.1064) that would affect the Defense Mapping Agency (DMA) in two ways. . . . Second, it would clarify that the United States has not waived sovereign immunity with respect to lawsuits based upon the content of DMA maps and charts.

103 H. Rep. No. 701, 103d Cong., 2d Sess. ("House Report") at p.204-05, 749 (1994).

Plaintiffs contend that § 2798 does not immunize the Government for the conduct at issue in this case. Plaintiffs make a semantic argument that the statute was not intended to immunize the Government for negligent failures to act, but only for suits based on the *content* of navigational aids. Plaintiffs maintain that § 2798 does not release the Government for its failure to issue corrective notices or to warn that Chart 24271 was no longer reliable.

In sum, plaintiffs argue that they do not dispute the accuracy of Chart 24271 when prepared and disseminated by the DMA, but that they find fault with the Government's negligent failure to update the Chart. This Court is unpersuaded by plaintiffs' argument.[2] The words of the statute are clear, and the intent of Congress in enacting § 2798 is apparent.[3] Congress specifically intended to immunize the DMA from suits that resulted from damages that eventuated as a consequence of reliance on maps and charts furnished by the DMA. Such protection was intended to shield the DMA irrespective of whether the damage resulted from a chart that was incorrect as an initial matter, or from a chart that became incorrect as a consequence of the DMA's failure to update it.[4]

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[2] Plaintiffs' principal point is that their claims are not covered by § 2798 because they are not based on the *content* of a navigation aid prepared by the DMA. Rather, their claims are based on failure to correct navigational aids. The Court is unconvinced. At heart, plaintiffs' contention is that the Hyundai New World was damaged as a result of the inaccurate information *contained* in Chart 24271. This is true regardless of whether the Chart was incorrect at inception or at some other moment. The fact remains that plaintiff has no claim if it was not harmed as a result of the inaccurate *content* of a chart prepared by the DMA.

[3] In construing statutes, the court's task is to "give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Negonsott v. Samuels*, 113 S. Ct. 1119, 1122-23 (1993) (citations omitted).

[4] This Court also finds plaintiffs' argument concerning the legislative history of § 2798 to be unpersuasive in light of the clear language of § 2798 and the apparent intent of Congress in its enactment of that

The United States may not be sued except as it has consented to be sued. *See Dalehite v. United States*, 346 U.S. 15, 30 (1953). Where sovereign immunity exists, subject matter jurisdiction is absent. *See United States v. Testan*, 424 U.S. 392, 399 (1976). In addition, any waiver of sovereign immunity must be strictly construed in favor of the sovereign. *See United States v. Sherwood*, 312 U.S. 584, 590 (1941).

Accordingly, because this Court finds that § 2798 prevents the DMA from being sued for the content of its products and that § 2798 has retroactive application and applies to pending actions, it concludes that § 2798 immunizes the Government from an action stemming from the alleged negligent conduct that lies at the heart of the instant action.

B. *Separation of Powers*

"It is axiomatic that 'within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Rabin v. Fivzar Associates*, 801 F.Supp. 1045, 1051-52 (S.D.N.Y. 1992) (Sweet, J.) (quoting *Mistretta v. United States*, 488 U.S.

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statute. Equally unavailing is plaintiffs' contention that their claim is not barred by § 2798 because it would be actionable if brought under the Federal Torts Claims Act. *See* Senate Report at p. 231-32 ("Claims against DMA are prohibited under the Federal Torts Claims Act . . . The provision recommended by the Committee would make it clear that the Government has not waived sovereign immunity with respect to claims based upon allegations concerning the content of DMA maps and charts.")

This Court further notes the inconsistency between plaintiffs' argument, addressed in the next section of this opinion, that Congress' enactment of § 2798 violates the separation of powers doctrine because the statute was passed in specific contemplation of the instant action, and plaintiffs' present argument, that § 2798 does not encompass the instant action. *See, e.g.*, Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss ("Plaintiff Mem.") at 23 ("[t]he retroactive provision of § 2798 is aimed directly at this case . . . The sole effect of the retroactive provision of § 2798 is therefore to affect the rule of decision in this case on the precise jurisdictional and immunity issue that was raised [in front of this Court]. . . . It is difficult to conceive of a clearer instance of Congress affecting the rule of decision in pending litigation").

361 (1989). "Under this system, the legislature is to enact laws of general application and the courts are to decide particular cases arising under those laws and to exercise the exclusive authority to say what the law is." *Id.* at 1052 (citations omitted). "Conversely stated, the judicial power cannot legislate, nor can the legislative power act judicially." *Id.* (citations omitted). A violation of the separation of powers doctrine occurs when Congress enacts legislation that prescribes a rule of decision to the judicial branch in cases pending before it without changing the underlying substantive or procedural law. *See United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). The separation of powers doctrine is also violated when Congress enacts a statute which requires federal courts to reopen final judgments entered before the statute's enactment. *See Plaut v. Spendthrift*, 115 S. Ct. 1447 (1995).

1. *Prescribing a Rule of Decision*

Plaintiffs contend that the application of Section 2798 to the instant case would violate the Constitution under the separation of powers principle. They argue that Section 2798 comprises a Congressional attempt to alter the rule of decision in a pending case in favor of the Government, and that such an attempt is prohibited by the Constitution. Plaintiff Mem. at 6-7. Plaintiffs maintain that cases such as *United States v. Klein*, 80 U.S. (13 Wall) 128 (1872) and *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) establish that a statute passed by Congress, which prescribes a rule of decision in a case pending before the courts and which does so in a manner that requires the courts to decide a controversy in the Government's favor, is unconstitutional.

Plaintiffs note that "[w]here acts of the Legislative Branch prevent the Judicial Branch from accomplishing its constitutionally assigned functions, Congress 'passes over the limit which separates the legislative from the judicial power.' " *Rabin*, 801 F.Supp. at 1052 (quoting *Sioux Nation*, 448 U.S. at 391); *see also Plaut*, 115 S. Ct. 1447. Plaintiffs assert that,

in enacting § 2798, Congress has impermissibly sought to affect the rule of decision in the instant action in a manner that requires a decision in the Government's favor. They argue that "[t]he retroactive provision of § 2798 is aimed directly at this case." Plaintiff Mem. at 23. Plaintiffs contend that the provision is effectively an appellate reversal of this Court's September 26, 1994 decision.[5]

Plaintiffs further argue that although "*Klein* does not preclude Congress from changing the law applicable to pending cases," *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 81 (2d Cir. 1993), it does preclude Congress from compelling results under old law, *Robertson v. Seattle Audubon Society*, 112 S. Ct. 1407, 1413 (1992). Plaintiffs assert that § 2798 does not amend or change the Suits in Admiralty Act, but rather "clarifies" it. As a consequence, plaintiffs maintain, § 2798 is merely Congress' interpretation of how it believes maritime claims against the United States based on the activities of the DMA, under the Suits in Admiralty Act, should be decided. Plaintiffs maintain that the enactment of § 2798 is an unconstitutional legislative attempt to compel findings under old law, rather than an attempt to create new law.[6]

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[5] In an opinion and order, issued on September 26, 1994, this Court found that the discretionary function exception, 28 U.S.C. § 2680(a), did not eliminate this Court's subject matter jurisdiction. The Court determined that the discretionary function exception to the Government's waiver of sovereign immunity, pursuant to the Suits in Admiralty Act, did not preclude this Court from exercising subject matter jurisdiction in the instant matter. This Court found the exception inapplicable because the DMA did not have a policy of not updating facsimile charts, and the Court was provided with no evidence that the failure to update Chart 24271 had anything to do with military, geopolitical, or economic considerations. In sum, this Court found that decisions concerning when a chart needed to be updated were technical rather than discretionary.

[6] This Court notes that "the characteristics of an impermissible act of legislative law-*interpreting* as contrasted to those of permissible legislative law*making* have yet to be defined." *Rabin*, 801 F.Supp. at 1052 (emphasis in original). The Court observes, however, that if § 2798 merely clarified existing law, then the Government never waived its

As the Supreme Court stated in *Seattle Audubon*, however, when Congress compels "changes in law, not findings or results under old law" it acts within its constitutional authority. *See Seattle Audubon*, 112 S. Ct. at 1413.[7] As in *Seattle Audubon*, the Court finds nothing in the relevant statute in this case, § 2798, that "purport[s] to direct any particular findings of fact or applications of law, old or new, to fact." *Id.* "[U]nlike the provision at issue in *Klein*, and like the statute at issue in [*Seattle Audubon*], [§ 2798] does not directly interfere with judicial fact-finding." *Cf. Axel Johnson*, 6 F.3d at 82. Rather, § 2798 specifies the law to be applied to the relevant cases and leaves to the courts the job of applying that law to the particular facts before them. *Cf. Rabin*, 801 F.Supp. at 1054. "Under [*Seattle Audubon*,] . . . a law will not be found to be unconstitutional even where it may effect the outcome of a case, unless it directs particular findings." *Brown v. Hutton Group*, 795 F.Supp. 1307, 1314 (S.D.N.Y. 1992). Section 2798 does not direct particular findings.

In sum, Congress has unconstitutionally exceeded its permitted role if it has instructed the courts to make specific findings of fact or directed results under old law, but Congress has not done so in the instant situation. Section 2798 does not direct courts to make a specific factual finding

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sovereign immunity, and plaintiffs have no viable claim. If, however, § 2798 modified existing law, and Congress used § 2798 to revoke its prior waiver, then plaintiffs' instant separation of powers argument is not feasible.

Congress is authorized to revise laws. *See Seattle Audubon*, 112 S. Ct. at 1413 (Congress may modify old laws even though some claims that would have been successful will now fail); *Axel Johnson*, 6 F.3d at 81 ("[t]he rule of *Klein* precludes Congress from usurping the adjudicative function assigned to the federal courts under Article III. However, *Klein* does not preclude Congress from changing the law applicable to pending cases.")

[7] The Second Circuit, in summarizing *Seattle Audubon*, has stated that a "statute may permissibly affect the outcome of a case, but may not direct findings of fact." *Litton Indus. v. Lehman Brothers Kuhn Loeb Inc.*, 967 F.2d 742, 751-52 n.6.

or to apply a specific rule of decision to cases before them. Congress has not instructed the courts to reach a particular decision on the merits of any claim. Accordingly, this Court finds that § 2798 should not be found unconstitutional for prescribing a rule of decision.

2. *Reopening Final Judgments*

The Second Circuit has stated, "so long as the claims, if they were purely statutory, had not ripened into final judgment, regardless of whether the activities on which they were based had been performed, they were subject to whatever action Congress might take with respect to them." *Battaglia v. General Motors Corp.*, 169 F.2d 254, 259 (2d Cir. 1948). More recently, the Supreme Court has held that, "[w]hen retroactive legislation requires its own application in a case already *finally adjudicated*, . . . such an act exceeds the powers of Congress," *Plaut*, 115 S. Ct. at 1456 (emphasis added).[8]

> [T]he decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must decide according to existing laws. Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a case or controversy, and Congress may not declare by retroactive legislation that

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[8] The Supreme Court definitively states, "Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." *Plaut*, 115 S. Ct. at 1457.

> the law applicable *to that very case* was something other than what the courts said it was.

Plaut, 115 S. Ct. at 1457 (citations omitted) (emphasis in original).[9]

This Court notes that there has been no final judgment in the instant action. This Court's opinion, dated September 26, 1994, determined that the discretionary function exception to the Suits in Admiralty Act did not preclude the instant suit, but § 2798 is not related to that ruling.[10] Section 2798 presents a jurisdictional bar to suits like the instant one irrespective of whether or not the discretionary function exception applies to the conduct of DMA officials.

Klein does not change the fact that courts are obligated to apply the law as they find it at the time of final judgment. *See American International Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 442 (D.C. Cir. 1981). The Supreme Court has made clear in *Plaut* that it is the obligation of the court to give effect to Congress' pronouncements until such time as judicial rulings have achieved finality. There has been no final ruling as regards the Government's sovereign immunity from all liability with respect to lawsuits based upon the content of

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[9] The Court goes on to say:

> The separation-of-powers violation here, if there is any, consists of depriving judicial judgments of the conclusive effect that they had when they were announced, not of acting in a manner—viz., with particular rather than general effect—that is unusual (though, we must note, not impossible) for a legislature. . . . Not favoritism, nor even corruption, but *power* is the object of the separation-of-powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the very best of reasons . . .

Plaut, 115 S. Ct. at 1457 (emphasis in original).

[10] Defendant notes that although the bill containing § 2798 was not signed into law by the President until October 5, 1994, both houses of Congress passed the legislation prior to this Court's decision. Therefore, Congress, at least, was not specifically attempting to overrule a decision of this Court.

Defense Mapping Agency maps, charts and other publications.[11] Consequently, in deciding the Government's instant motion, this Court must apply the law as it currently exists. The fact that Congress recently modified that law, perhaps in direct contemplation of the instant action,[12] does not constitute an unconstitutional abrogation of the separation of powers. Accordingly, this Court finds that § 2798 should not be found unconstitutional for impermissibly reopening a final judgment.

3. *Conclusion*

For the reasons stated above, this Court finds that § 2798 does not unconstitutionally violate the separation of powers doctrine.

C. *Due Process*

Plaintiffs also argue that § 2798 violates Fifth Amendment due process. Under the "vested rights" doctrine, the legislature may not, consistent with Article III and the Fifth Amendment, direct the reversal or suspension of a decision of a federal court, or take away rights which have been once vested by judgment. *See Rabin*, 801 F.Supp. at 1055. "[R]ights fixed by judgment are, in essence, a form of property over which legislatures have no greater power than any other [property]." *Axel Johnson*, 6 F.3d at 83 (citations omitted). A cause of action, however, "is inchoate and affords no definite or enforceable property right until reduced to final

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[11] As previously noted, on September 26, 1994, this Court ruled on the narrow issue of whether it lacked subject matter jurisdiction pursuant to the discretionary function exception to the Government's waiver of sovereign immunity in the Suits in Admiralty Act. This Court merely found that such exception did not eliminate the Court's jurisdiction.

[12] The Government readily admits that Congress had the instant case in mind when it considered the new bill. The Government even cites to the section of the Congressional Record where the instant action is used as an example. *See* Defendant Mem. at 5; Defendant's Reply to Plaintiffs' Memorandum in Opposition ("Defendant Reply") at 6.

judgment." *Konizeski v. Livermore Labs*, 820 F.2d 982, 989 (9th Cir. 1987).

This Court's opinion, dated September 26, 1994, determined that the discretionary function exception to the Suits in Admiralty Act did not preclude the instant suit, but it did not create any rights for Hyundai. In addition to there having been no final judgment,[13] Hyundai was simply not granted any rights by this Court's earlier decision.

Furthermore, an "act of Congress comes to us clothed with a presumption of constitutionality, and the burden is on the plaintiff to show that it violates due process. *Konizeski*, 820 F.2d at 990. To comport with the requirements of due process, the retroactive application of a statute must be supported by a legitimate legislative purpose furthered by a rational means. *Id.* at 991; *see also United States v. Carlton*, 114 S. Ct. 2018, 2022 (1994).

Plaintiffs contend that the retroactive application of § 2798 is unconstitutional. Plaintiffs argue that they relied on the clear waiver of immunity contained in the Suits in Admiralty Act in pursuing the instant action. They assert that the effect of retroactively applying § 2798 is the impermissible targeting of the instant lawsuit. Plaintiffs conclude that the effect of Congress' action is particularly harsh and oppressive, and is so unfair and inequitable as to be unconstitutional.

The Court notes that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. *See Konizeski*, 820 F.2d at 990. The Court finds that plaintiffs have not met their burden of showing that § 2798 is wholly arbitrary and irrational in purpose and effect and that it is not related to a legit-

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[13] *Cf. Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 310-16 (1945) (where defendant's "statutory immunity from suit had [not] been fully adjudged so that legislative action deprived it of a final judgment in its favor" due process not violated by restoration of remedy to plaintiff). "[A] case remains 'pending,' and open to legislative alteration, so long as an appeal is pending or the time for filing an appeal has yet to lapse. *See Axel Johnson*, 6 F.3d at 84.

imate congressional purpose. *Id.* at 990. The reasons asserted by the Government for Congress' enactment of § 2798 are neither arbitrary nor irrational. This Court finds that § 2798 had a legitimate legislative purpose which was furthered by rational means. This Court further finds that the retroactive application of § 2798 is neither so oppressive nor so inequitable as to render such application unconstitutional.

CONCLUSION

For the reasons stated above, the court grants defendant's motion to dismiss, and this action is dismissed in its entirety.

SO ORDERED.

Dated: May 31, 1995
New York, New York

/s/ PETER K. LEISURE
U.S.D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Filed June 2, 1995

89 Civil 2025 (PKL)

HYUNDAI MERCHANT MARINE CO., LTD., POHANG IRON AND STEEL CO., LTD., THE ORIENTAL FIRE & MARINE INSURANCE CO., LTD., THE SHIN DONG-A FIRE & MARINE INSURANCE CO., LTD., DAEHAN FIRE, MARINE INSURANCE CO., LTD., INTERNATIONAL FIRE & MARINE INSURANCE CO., LTD., KORYO FIRE & MARINE INSURANCE CO., LTD., FIRST FIRE & MARINE INSURANCE CO., LTD., HAEDONG FIRE & MARINE INSURANCE CO., LTD., THE ANKUK FIRE & MARINE INSURANCE CO., LTD., HYUNDAI MARINE & FIRE INSURANCE CO., LTD., LUCKY INSURANCE CO., LTD., KOREA AUTOMOBILE FIRE & MARINE INSURANCE CO., LTD.,

Plaintiffs,

—against—

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

Defendant having moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and the said motion having come before the Honorable Peter K. Leisure, U.S.D.J., and the Court thereafter on May 31, 1995, having handed down its Opinion (74815) and Order, granting the defendant's motion it is hereby,

ORDERED, ADJUDGED, AND DECREED: That the complaint be and it is hereby dismissed in its entirety.

Dated: June 2, 1995
New York, New York

/s/ JAMES M. PARKISON
Clerk of Court

BY: JOHN S. HAGEN
Deputy Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Filed January 26, 1996

Docket # 95-6178

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-sixth day of January one thousand nine hundred and ninety-six,

PRESENT: Jon O. Newman, Chief Judge
J. Daniel Mahoney, Circuit Judge
Daniel M. Friedman, Circuit Judge*

HYUNDAI MERCHANT MARINE CO., LTD., POHANG IRON AND STEEL CO., LTD., THE ORIENTAL FIRE & MARINE INSURANCE CO., LTD., THE SIN DONG-A FIRE & MARINE INSURANCE CO., LTD., DAEHAN FIRE, MARINE INSURANCE CO., LTD., INTERNATIONAL FIRE & MARINE INSURANCE CO., LTD., KORYO FIRE & MARINE INSURANCE CO., LTD., FIRST FIRE & MARINE INSURANCE CO., LTD., HAEDONG FIRE & MARINE INSURANCE CO., LTD., THE ANKUK FIRE & MARINE INSURANCE CO., LTD., HYUNDAI MARINE & FIRE INSURANCE CO., LTD., LUCKY INSURANCE CO., LTD., KOREA AUTOMOBILE FIRE & MARINE INSURANCE CO., LTD.,

Plaintiffs-Appellants,

—against—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from a judgment of the United States District Court for the Southern District of New York,

This matter came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued.

Upon consideration thereof, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment be, and it hereby is, affirmed.

FOR THE COURT:
GEORGE LANGE III, Clerk

by: BETH J. MEADOR
Beth J. Meador, Administrative Attorney
Administrative Attorney

Supreme Court, U.S.
FILED
JUN 28 1996
CLERK

(2)

No. 95-1744

In the Supreme Court of the United States

OCTOBER TERM, 1995

HYUNDAI MERCHANT MARINE CO., LTD., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether either the separation-of-powers doctrine or the Due Process Clause was violated by the application to this case of 10 U.S.C. 2798, which repeals the United States' waiver of sovereign immunity based on the content of navigational aids prepared or disseminated by the Defense Mapping Agency, and which was enacted while petitioners' claims were pending in the district court.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 75 F.3d 134. The opinion of the district court (Pet. App. 4a-19a) is reported at 888 F. Supp. 543.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1996 (Pet. App. 22a), and the petition for a writ of certiorari was filed on April 25, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 2798 of Title 10 provides:

> (a) CLAIMS BARRED.—No civil action may be brought against the United States on the basis of the content of a navigational aid prepared or disseminated by the Defense Mapping Agency.
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> (b) NAVIGATIONAL AIDS COVERED.—Subsection (a) applies with respect to a navigational aid in the form of a map, a chart, or a publication and any other form or medium of product or information in which the Defense Mapping Agency prepares or disseminates navigational aids.

The note following the text of Section 2798 provides, in pertinent part:

> Section 2798 of title 10, United States Code, * * * shall take effect on the date of the enactment of this Act [Oct. 5, 1994] and shall apply with respect to (1) civil actions brought before such date that are pending adjudication on such date, and (2) civil actions brought on or after such date.

STATEMENT

1. The Defense Mapping Agency (DMA) is a Combat Support Agency of the United States Department of Defense. 10 U.S.C. 193(f)(4). Its mission is to "improve means of navigating vessels of the Navy and the merchant marine by providing, under the authority of the Secretary of Defense, accurate and inexpensive nautical charts * * * for the use of all vessels of

the United States and of navigators generally." 10 U.S.C. 2791. The DMA's primary role is military:

> Its mission is to produce topographic, aeronautical and nautical maps, charts and other publications in hardcopy and softcopy versions to support United States warfighters. However, many of its products are used by mariners navigating vessels around the world.

140 Cong. Rec. S5065 (daily ed. May 3, 1994). See also S. Rep. No. 282, 103d Cong., 2d Sess. 231 (1994).

Petitioners are the owner and operator of the ore-carrier Hyundai New World, the owner of the ship's cargo, and the insurance underwriters of the ship's cargo. On March 31, 1987, the Hyundai New World ran aground on a shoal off the coast of Brazil as it sought to enter in the Baia de Sao Marcos. Petitioners sued the United States for various tort damages, claiming that the grounding was caused by DMA's negligence in failing to update a navigation chart that no longer accurately reflected the position of the shoal. Jurisdiction was founded upon the Suits in Admiralty Act (SAA), 46 U.S.C. App. 741 *et seq.* See Pet. App. 4a-7a; C.A. App. 23-30.

The chart on which petitioners claimed the Hyundai New World had relied was published by the DMA on April 23, 1983. It states that it is a reproduction of a chart produced by the Brazilian government on the basis of surveys done by the Brazilian Navy in 1974. Pet. App. 6a. Petitioners also claimed that the DMA had failed to update the information in the chart in any of the weekly notices to mariners that it produces that update existing charts with new hydrographic information. In 1984, petitioners claimed, the Brazilian government performed new hydrographic surveys

in the Baia de Sao Marcos that indicated that the shoal on which the Hyundai New World later foundered had extended northward. As a result, water depths were now between 14 and 17 meters in areas where the DMA's chart indicated depths were between 25 and 38 meters. Petitioners claimed that, although the DMA had received charts from the Brazilian government and notices from the British government indicating those changes, the DMA had not published that information before the grounding of the Hyundai New World. *Id.* at 6a-7a.

2. On April 22, 1994, after completion of discovery, the government moved to dismiss the action on the grounds that the discretionary function exception to the Federal Tort Claims Act's waiver of sovereign immunity, 28 U.S.C. 2680(a), precluded petitioners' claims. The district court denied that motion, ruling that the discretion exercised by the DMA merely concerned technical matters. See C.A. App. 249-261.

Two days before the government's motion to dismiss was filed, the Department of Defense (DoD) transmitted to Congress its draft of the 1995 Department of Defense Authorization bill, which contained a repeal of the waiver of sovereign immunity for lawsuits relating to DMA charts.[1] Although DoD's draft bill did not contain any provision stating that the repeal would apply to cases pending at the time of its enactment, see C.A. App. 374-375, as enacted by

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[1] Petitioners err in describing the legislation as part of an "appropriations bill." Pet. i, 4. The bill was a Department of Defense Authorization bill. In any event, "Congress * * * may amend substantive law in an appropriations statute, so long as it does so clearly." *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992).

Congress and signed by President Clinton on October 5, 1994, the bill provided that the repeal of the waiver of sovereign immunity would apply to pending cases, see *id.* at 376, 378-379.[2]

The statute repealing the waiver of sovereign immunity is codified at 10 U.S.C. 2798. In pertinent part, it provides that "[n]o civil action may be brought against the United States on the basis of the content of a navigational aid prepared or disseminated by the Defense Mapping Agency." 10 U.S.C. 2798(a). It also provides that the Act "shall take effect on the date of the enactment of this Act * * * and shall apply with respect to (1) civil actions brought before such date that are pending adjudication on such date, and (2) civil actions brought on or after such date." 10 U.S.C. 2798 note.

In its legislative proposal, DoD stated that the repeal of the waiver of sovereign immunity with respect to the content of DMA charts served the following purposes:

> DMA relies heavily upon nautical and aeronautical products and information of other countries. A tremendous quantity of information is processed in preparing and distributing thousands of maps and charts and related information. DMA

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[2] Contrary to petitioners' description of the statute as "stealth legislation" (Pet. i, 6-7, 13), the DoD's initial proposal was published in the Congressional Record on May 4, 1994 (see C.A. App. 381), the revised bill was published in the Senate Report on June 14, 1994 (see *id.* at 376, 378-379), and the final bill was published in the Conference Report on August 12, 1994 (see *id.* at 383, 384-385). See also *id.* at 268-275 (noting that the Justice Department attorneys involved in this litigation were not aware until after the bill's passage that a bill was under consideration that would affect this case).

> exercises great care to ensure the accuracy of all its products. Since DMA cannot independently verify all the information supplied by foreign sources it is unreasonable to subject the United States to unlimited liability in the production and distribution of these many products.
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> For example, in the case of *Hyundai Merchant Marine Co., Ltd. et al. v. United States*, the HYUNDAI NEW WORLD, a 200,000 deadweight ton bulk cargo carrier, stranded in the Bay of Sao Marcos, Brazil, on 31 March 1987, resulting in a total loss of ship and cargo. The ship owner, cargo owners and underwriters of same, sued the United States for negligence alleging that the navigators of HYUNDAI NEW WORLD were using [a] DMA chart * * * (A DMA facsimile of a Brazilian chart) containing errors and omissions which were the cause of the stranding. The potential damages to date are estimated at $60 million.
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> Th[e] proposed statutory language would make it clear that the activities of the Defense Mapping Agency in the preparation and production of maps, charts, aids to navigation, publications, products and information, in whatever form, primarily for use of U.S. warfighters, are expressly exempt from any claim or cause of action.

140 Cong. Rec. S5065 (daily ed. May 3, 1994). The Senate Report on the bill, in turn, explained:

> The committee recommends two provisions, requested by the Administration, related to DMA maps and charts.
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> * * * * *

> The second provision would make it clear that the United States has not waived sovereign immunity with respect to lawsuits based upon the content of DMA maps and charts. Claims against DMA are prohibited under the Federal Tort Claims Act,[3] but an issue has arisen as to whether the Suits in Admiralty Act (46 U.S.C. 741 et seq.) provides an independent jurisdictional basis for lawsuits against DMA. The provision recommended by the committee would make it clear that the government has not waived sovereign immunity with respect to claims based upon allegations concerning the content of DMA maps and charts.

S. Rep. No. 282, *supra*, at 231-232.[4]

3. The government thereupon moved to dismiss based on 10 U.S.C. 2798, the new statute. The district court granted that motion. Pet. App. 4a-19a. It held that Section 2798 clearly applied to the DMA's alleged failure to amend the chart and to issue a notice correcting the information in the chart. *Id.* at 10a. Thus, the district court held, the United States enjoyed sovereign immunity with regard to petitioners' claims. *Id.* at 11a. The court rejected petitioners'

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[3] The committee was apparently referring to the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), which has been held to apply to cases brought under the SAA. See, *e.g.*, *Baldassaro* v. *United States*, 64 F.3d 206, 208 (5th Cir. 1995), cert. denied, 116 S. Ct. 1823 (1996); *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989). At the time of the Senate Report, the district court in this case had not yet ruled on whether that exception applied to this case.

[4] The first provision, which became 10 U.S.C. 2797, prohibited unauthorized use of the name, initials, or seal of the DMA.

claim that the application of Section 2798 to pending claims violated the separation of powers. *Id.* at 11a-17a. The court noted that, under this Court's decision in *Robertson* v. *Seattle Audobon Society*, 503 U.S. 429, 438 (1992), "when Congress compels 'changes in law, not findings or results under old law[,]' it acts within its constitutional authority." Pet. App. 14a. And, the court stated, nothing in Section 2798 "purport[s] to direct any particular findings of fact or applications of law, old or new, to fact." *Ibid.* (quoting *Seattle Audobon Soc'y*, 503 U.S. at 438). Nor, the court held, did the new statute impermissibly reopen a final judgment, because there was no such judgment in this case. *Id.* at 15a-17a. Finally, the court rejected petitioners' claim that the new statute violated the Due Process Clause by depriving them of a "vested right." *Id.* at 17a. The court noted that "[a] cause of action * * * 'is inchoate and affords no definite or enforceable property right until reduced to final judgment.'" *Id.* at 17a-18a (citation omitted).

4. The court of appeals summarily affirmed, Pet. App. 1a-3a, "on the basis of [the district court's] comprehensive and well-reasoned opinion," *id.* at 3a.

ARGUMENT

1. The United States is immune from suit except where it has consented to be sued, "and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Testan*, 424 U.S. 392, 399 (1976). It is for Congress to determine whether and to what extent to waive such immunity. *Dalehite* v. *United States*, 346 U.S. 15, 30 (1953); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). As petitioners recognize (Pet. 7), by enacting

Section 2798, Congress clearly repealed the waiver of sovereign immunity for tort claims codified in the Federal Tort Claims Act, 28 U.S.C. 2680(a), and the Suits in Admiralty Act, 46 U.S.C. App. 742, with regard to claims based on the contents of maps, charts, books, notices and other publications disseminated by the Defense Mapping Agency.

2. Contrary to petitioners' claim (Pet. 8-11), application of Section 2798 to petitioner's case does not violate the separation-of-powers principle. Under that principle, Congress may not reopen or direct the reopening of a final judgment. See *Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1457 (1995). But, as this Court has observed in *Plaut* (see *ibid.*), the separation-of-powers principle does not forbid Congress from revising the judgment of an Article III court while that judgment is still pending on appeal:

> Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.

That is because "the decision of an inferior court is not (unless the time for appeal has expired) the final word of the [judicial] department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must 'decide according to existing laws.'" *Plaut*, 115 S. Ct. at 1457. If Congress can change the applicable law after a judgment has been issued and a

case is on appeal, *a fortiori*, Congress can change the underlying law so as to affect cases, like the instant case, in which an action has been filed but which has not proceeded to judgment.

Petitioners' reliance upon *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), is misplaced. The Court in *Klein* "refused to give effect to a statute that was said '[t]o prescribe rules of decision to the Judicial Department of the government in cases pending before it.'" *Plaut*, 115 S. Ct. at 1452 (quoting 80 U.S. (13 Wall.) at 146). But, as this Court has noted, the prohibition in *Klein* "does not take hold when Congress 'amend[s] applicable law.'" *Plaut*, 115 S. Ct. at 1452-1453 (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)). In this case, Congress has amended applicable law governing sovereign immunity, and has not done anything "to direct any particular findings of fact or applications of law, old or new, to fact." *Seattle Audubon Soc'y*, 503 U.S. at 438.

Moreover, in *Klein*, "Congress overstepped its bounds by granting the Court of Claims jurisdiction * * *, while prescribing a rule of decision that left the court no adjudicatory function to perform." *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 392 (1980). In the instant case, by repealing its earlier waiver of sovereign immunity, Congress has provided that there is no judicial jurisdiction whatever to consider that question.[5]

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[5] Petitioners claim (Pet. 7, 10) that Congress effectively has acted for the purpose of disposing of the instant case, because it is the only pending suit against the United States based on the DMA's charts. The United States had previously been sued based on DMA's activities. See *Empire Transport Inc.* v. *United States*, 1974 A.M.C. 1517 (S.D.N.Y. 1974), aff'd, 524 F.2d 1 (2d Cir. 1975); *United States Lines, Inc.* v. *United*

3. Application of Section 2798 to this case does not violate the Due Process Clause, contrary to petitioners' claims. See Pet. 11-13. The new statute does not affect a contract right or any other vested right. The general rule is that a legal claim creates no definite or enforceable property right until reduced to final judgment. *Sowell* v. *American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) (collecting cases); *Battaglia* v. *General Motors Corp.*, 169 F.2d 254, 259 (2d Cir.), cert. denied, 335 U.S. 887 (1948). In arriving at a judgment, judges must apply the law in effect on the date of decision, even though that law was enacted after the events giving rise to the suit. *Plaut*, 115 S. Ct. at 1447; *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1501 (1994). Even when a final judgment has been entered, if the case is pending on appeal the appellate court must apply the new law:

> It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt, in the

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States, 79 Civ. 4209 (IBC) (unpublished 1983 opinion of Southern District of New York, dismissing action against government); *Rappenecker* v. *United States*, 509 F. Supp. 1024 (N.D. Cal. 1980). While the instant lawsuit may have been the impetus for Congress's action, the statute applies broadly to all similar claims in the future.

> present case, has been expressed, I know of no court which can contest its obligation.

United States v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1802).

Petitioners assert (Pet. 11-13) that, because Section 2798 was enacted after petitioners had commenced suit, the rights granted by the SAA had "vested," and Congress was no longer free to extinguish petitioners' cause of action. However, "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," *Silver* v. *Silver*, 280 U.S. 117, 122 (1929), even when such "legislation readjusting rights and burdens * * * upsets otherwise settled expectations," *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976). See also *New York Central R.R.* v. *White*, 243 U.S. 188, 198 (1917) ("No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) ("Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.'") (citation omitted).

The cases cited by petitioners (Pet. 11-12) concern either contractual rights, property rights, or rights to money which, under this Court's decisions, had already accrued or "vested" at the time suit for those sums had commenced. For example, in *Ettor* v. *City of Tacoma*, 228 U.S. 148 (1913), this Court reviewed a lower court decision upholding a State's repeal of a statutory remedy that provided compensation to property owners for consequential damages resulting

from grading of public streets. The statutory basis for the State to perform grading operations had been coupled with the right of the affected property owners to consequential damages. The underpinning for the Court's statement that "[t]he right to compensation was a vested property right," was that "the action [was] *neither for a tort*, nor for a penalty, nor for a forfeiture, but for injury to property actually accomplished before the repeal of the law under which the street was graded, which required compensation to be made." *Id.* at 157-158 (emphasis added). See also *Forbes Pioneer Boat Line* v. *Board of Comm'rs of Everglades Drainage Dist.*, 258 U.S. 338, 339 (1922) (a state legislature cannot take away from a private party a right to recover money that becomes due when the act is passed); *Coombes* v. *Getz*, 285 U.S. 434, 440-441 (1932) (liability created by state constitutional provision was concededly contractual in nature, and attempted repeal of it while an appeal was pending violated the Contracts Clause of the federal Constitution); *Steamship Co.* v. *Joliffe*, 69 U.S. (2 Wall.) 450, 457 (1865) (provision for "half-pilotage fees" was quasi-contractual and liability thus arising is said to be a liability upon an implied contract). Because rights arising out of a tort claim do not vest until there is a final judgment, the Due Process Clause is not implicated by application of Section 2798 to petitioners' claims.[6]

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[6] Petitioners' reliance (Pet. 12-13) on the decision of the European Court of Human Rights in *Pressos Compania Naviera S.A.* v. *Belgium*, Case 38/1994/485/567 (Nov. 20, 1995), published in *European Transport Law* [1996] at 71-90, is thus misplaced. Unlike law in this country, Belgian tort law provides that "a claim for damages [is] in principle generated when the damage occurred, as the judicial decision merely

Even if the legislation in this case were retroactive in nature, retroactive legislation "in the sphere of economic policy" satisfies the Due Process Clause provided that the legislation is "supported by a legitimate legislative purpose furthered by rational means"; in such instances, "judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *United States* v. *Carlton*, 114 S. Ct. 2018, 2022 (1994) (citations omitted). Section 2798 is supported by such a legitimate purpose. As Congress recognized (140 Cong. Rec. S5065 (daily ed. May 3, 1994)):

> DMA relies heavily upon nautical and aeronautical products and information of other countries. A tremendous quantity of information is processed in preparing and distributing thousands of maps and charts and related information. DMA exercises great care to ensure the accuracy of all its products. Since DMA cannot independently verify all the information supplied by foreign sources it is unreasonable to subject the United States to unlimited liability in the production and distribution of these many products.

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confirm[s] its existence and determine[s] the relevant amount," *id.* at 83 (¶ 30), and a claim is thus an "asset" and a "possession." *Id.* at 83-84 (¶ 31). European notions of sovereign immunity are distinct from doctrines of sovereign immunity in this country, including the fact that immunity issues turn on a balancing of "the demands of the general interest and the requirements of the protection of [plaintiffs'] right to the peaceful enjoyment of their possessions [the tort claims]." See *id.* at 81 (¶ 25), 82-83 (¶ 28). In the United States, the judgment whether sovereign immunity is to be waived is left entirely to Congress.

Apprised of an actual lawsuit seeking tens of millions of dollars for the grounding of a Korean ship in a Brazilian bay, which was alleged to have been caused by the ship's reliance on a DMA reprint of a Brazilian chart based on Brazilian surveys done 13 years earlier, Congress acted reasonably in determining that the United States should not risk exposure to "unlimited liability," 140 Cong. Rec. S5065 (daily ed. May 3, 1994), as an insurer of the accuracy of various DMA charts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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